Office of Chief Counsel Internal Revenue Service

memorandum

CC:LM:CTM:LA:2:POSTF-113391-02

RLKave

June 18, 2002 date:

to:

Team Coordinator

LMSB, Team (Glendale)

ROGER L. KAVE from:

Attorney (LMSB)

subject:



This memorandum responds to your request for assistance in preparing the through statute extensions for the following discussed entities. The earliest statute date is . The statutes will be extended to December . This memorandum should not be cited as precedent.

Notification of Taxpayer's Rights

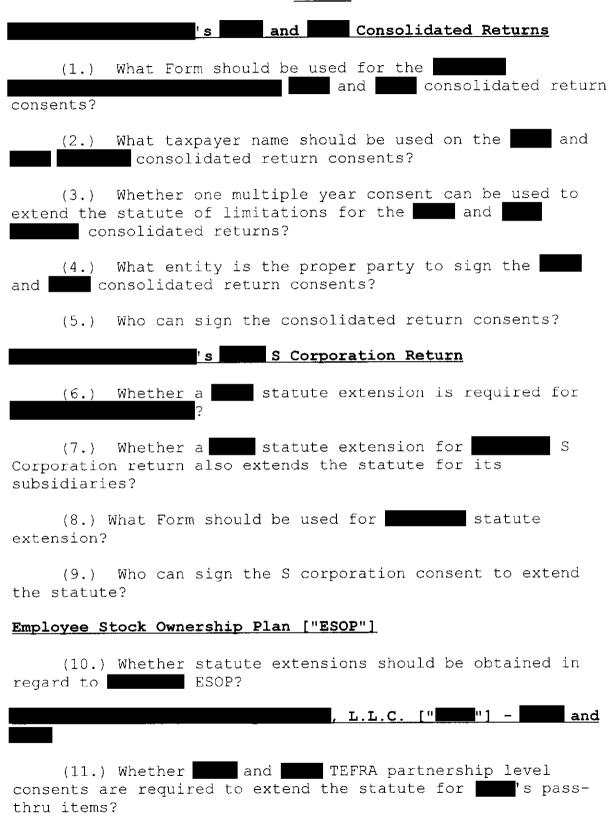
As a result of the IRS Restructuring and Reform Act of 1998, the Service must notify the taxpayer on each occasion when the taxpayer is requested to extend the statute by consent as to the following rights:

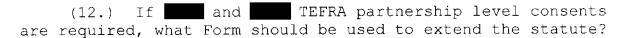
- The right to refuse to extend the limitation period; a.
- b. The right to request the extension to be limited to particular issues held open for further examination or appeal.
- The right to request the limitation period to be C. limited to a specific date.

I.R.M. § 25.6.22.3(1).

The notification must be made to the taxpayer by: (1) sending or presenting Letter, L-907, and (2) Sending or presenting Publication 1035 (Extending the Tax Assessment Period). I.R.M. § 25.6.22.3(2).

ISSUES





(13.) If and TEFRA partnership level consents are required, what parties should sign the statute extension?

, L.L.C. ["""] -

(14.) Whether a TEFRA partnership level consent is required to extend the statute for spass-thru items?

- and

-

- (15.) What Form should be used to extend the statue of limitations for and and pass-thru items?
- (16.) What parties should sign the statute extension, if TMP of the statute extension, if partnership?
- (17.) What parties should sign the statute extension, if TMP of time, is considered to be a TEFRA partnership?
- (18.) What Form should be used to extend the statue of limitations for pass-thru items?
 - (19.) What party should sign the statute extension?

CONCLUSIONS

's and Consolidated Returns

- (1.) We recommend that you use Forms 872-I for the and consolidated return consents.
- (2.) We recommend the following for the name of the taxpayer to be used on and and consolidated return consents:

Because name changed during the middle of the tax year, on the first line of the Form 872-I, the

name of the taxpayer would be " (EIN:), as agent for (EIN:) (formerly) and consolidated group*"
Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872-I followed by -
* This is with respect to the consolidated federal income tax of (EIN:) (formerly consolidated group for the group's taxable year ending .
On the first line of the Form 872-I, the name of the taxpayer would be " (EIN:), as agent for consolidated group*"
Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872-I followed by -
* This is with respect to the consolidated federal income tax of (EIN:) consolidated group for the group's taxable year ending .
Verify that self-self-self-self-self-self-self-self-
(3.) Because of the name difference shown above between the and consents and because it is sometimes difficult to determine the subsidiary mix of a consolidated group from year to year, we recommend that <u>separate</u> consents be obtained for and .
(4.) and consolidated group, is the proper party to sign the and consolidated group statute extensions. We recommend that the <u>signature block</u> contain only the current name of the common parent, " ," without reference to the subsidiaries. The reference to "formerly " is not required for the <u>signature block</u> of the consent.

(5.) The consolidated return consent(s) must be signed by a *current* duly authorized officer of

's S Corporation Return

- (6.) Although there is no corporate level statute of limitations on non-TEFRA S corporation pass thru items, we recommend that an income tax statute extension be obtained for "to protect the statute from expiring in regard to potential corporate level taxes that may be imposed in regard to:
 - a. Tax imposed on S corporation built-in gains (I.R.C. § 1374);
 - b. Tax imposed on S corporation passive investment income (I.R.C. § 1375); and
 - c. Potential C corporation tax if it is later determined that does not qualify as an S corporation.
- (7.) Because the separate existence of QSubs are ignored,

 ' QSubs are disregarded entities not treated as separate corporations and their assets, liabilities, and items of income, deduction, and credits are treated as those of Therefore, a statute extension for " Covers both as an S corporation and its related QSubs.

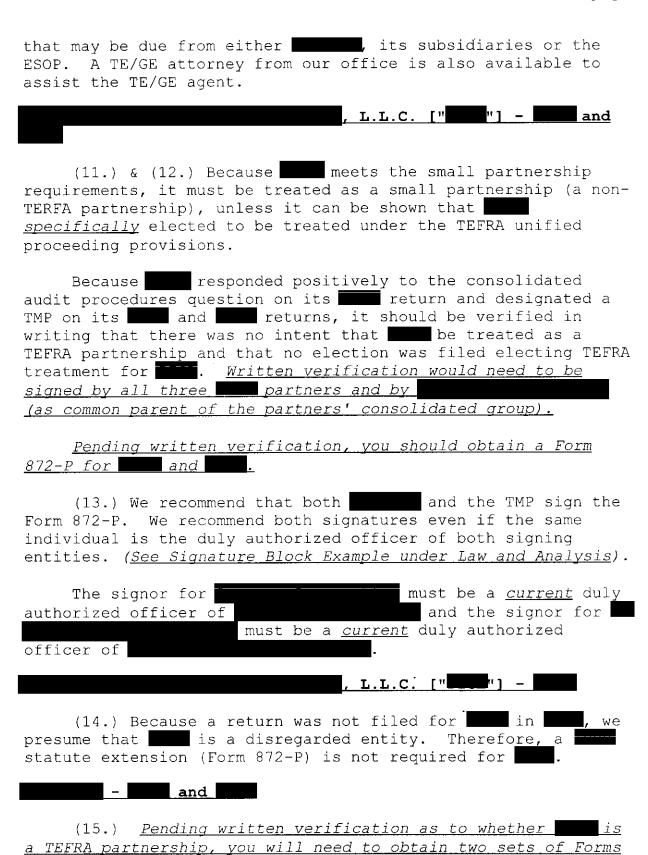
We will need to discuss the statute extension requirements for any subsidiary for which did not make a QSub election.

- (8.) Because in is considered to be a direct partner in TEFRA partnership, we recommend that you use Form 872-I for the corporate level consent.
- (9.) The S corporation consent must be signed by a <u>current</u> duly authorized officer of

Employee Stock Ownership Plan ["ESOP"]

exempt from flow thru income tax in we recommend that you bring in a TE/GE revenue agent to assist in obtaining consents to extend the statute for any potential Chapter 43 excise tax

872-P for



One set to be signed treating as a

non-TEFRA partnership and the other set to be signed treating as a TEFRA partnership.

- (16.) See the discussion under Law and Analysis for the signature block to be used, if _____, TMP of _____, is not considered to be a TEFRA partnership.
- (17.) See the discussion under Law and Analysis for the signature block to be used, if _____, TMP of _____, is considered to be a TEFRA partnership.
- (18.) Form 872-P should be used to extend the statute for tax year.
- (19.) Because holds a direct partnership interest in based upon the QSub election for and was designated as the TMP on 's Form 1065, should sign 's Form 872-P as follows:

by [name of authorized representative for _____, title of authorized representative], Tax Matters Partner of _____

The signor for must be a <u>current</u> duly authorized officer of

General Comment Regarding Authority to Sign Statute Extensions

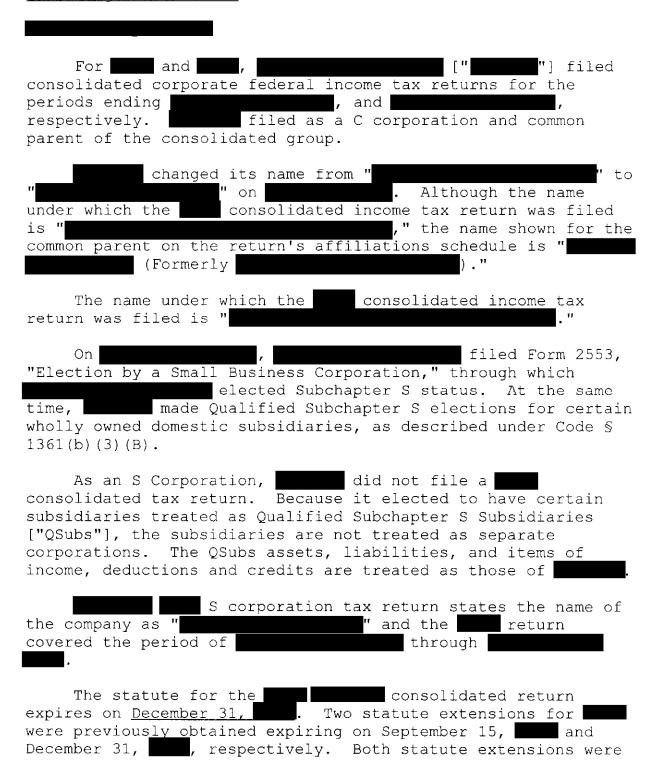
You requested whether it would be appropriate for to sign all of the statute extensions to be secured.

is a Vice President and Assistant Treasurer of

All of the consents must be signed by a dully authorized person of the particular entity on whose behalf the person is signing. As an example, if is signing in his capacity as an officer of authorized by the Board of Directors to act in such capacity. If is going to sign as an officer of the Board of Directors of to act in such capacity. Board of Directors cannot authorize an officer to sign on behalf of

FACTS

Since our conclusions are dependent upon the following factual recitation, it is imperative that you verify the following stated facts.



obtained via Forms 872.

The taxpayer's name used on both of the statute extensions was " and the corporate name shown in each signature block was " Corporation & Subsidiaries."

Statute extensions have not been obtained regarding and and tax years. consolidated return was signed on September 14, and its S corporation return was signed on September 15,

Since , all of common stock has been owned by its employee stock ownership plan ["ESOP"].

L.L.C.

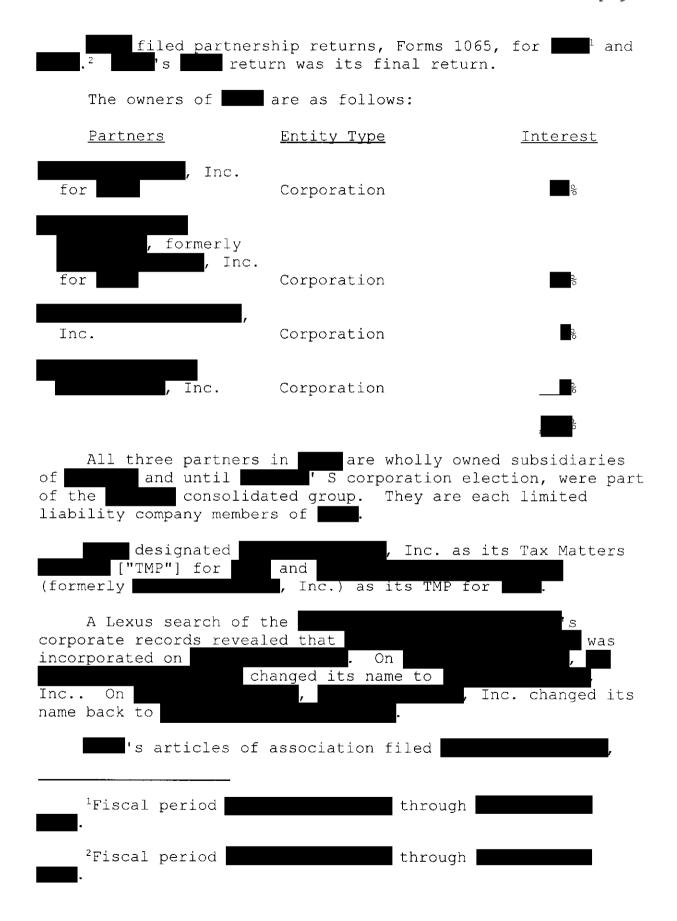
incorporated in as a limited liability company. Paragraph of 's articles of association, filed at the time of incorporation, provides that

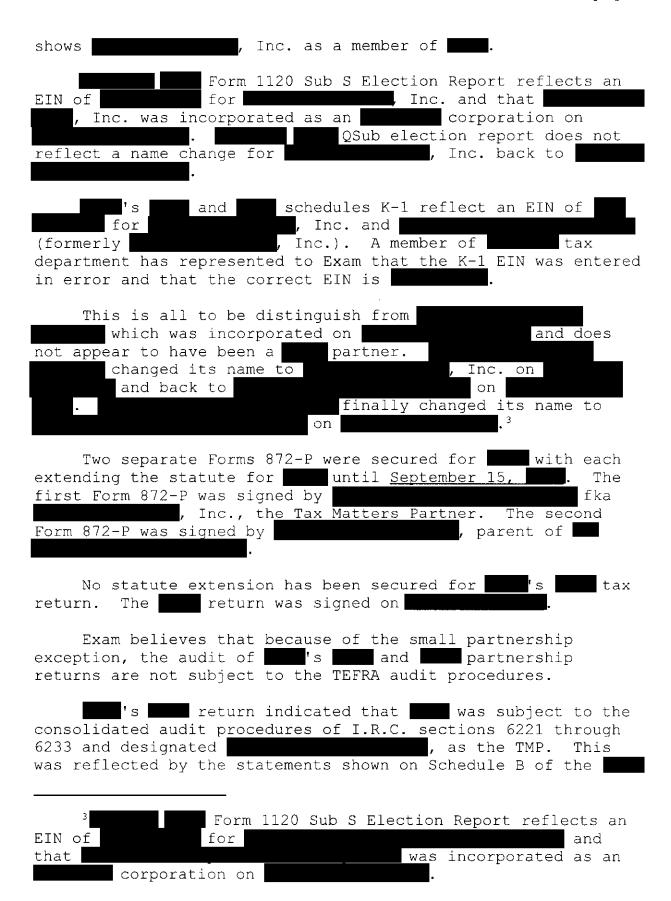


Paragraph of the articles of association further provides that "

." A Member is defined in paragraph of the articles as "

The articles of association also provide in paragraph that the "





correct EIN is

Form 1065. 's return indicated on Schedule B that was not subject to the TEFRA procedures of I.R.C. §§ 6221 through 6233 but still designated (formerly Inc.) as its TMP. Exam alleges that an appropriate "formal" election to be treated as a TEFRA partnership was never filed for Attached to 's Form 1065 for was the following statement: A Form 1065 was not filed for because of the QSub elections for 's three partners. filed partnership returns, Forms 1065, for 4It is our <u>understanding</u> that

⁵Fiscal period through

\mathbf{r}^6 and \mathbf{r}^7		
The owners of	are as follows:	
Partner	Entity Type	<u>Interest</u>
(Limited	Partnership	ફ
	LLC/Partnership	୍ଚ
[""""]	Foreign Corp.	oo
, a foreign c unrelated to	, a foreig orporation located in	n partnership, and , are
that TEFRA audit p	f the , and rocedures apply and, in re was designated as the TMP for .	gard to the
Three separate extending the stat The first Form 872 second Form 872-P 872-P was signed by	-P was signed by , TMP was signed by , TMP of . Finally	tember 15,
partnership r	tensions have been secured eturns. 's range rang	eturn w <u>as signed</u> on
The following:	statement was attached to	the return of
⁶ Fiscal period	through	ı
⁷ Fiscal period	d through	n

On filed Form 2553, "Election by a Small Business Corporation," through which elected Subchapter S status. At the same time, made Qualified Subchapter S Subsidiary ("QSub") elections for certain wholly owned domestic subsidiaries, as described under § 1361(b)(3)(B) of the Internal Revenue Code of 1986, as amended. These included all three owners of L.L.C. (" "). Following these QSub elections, all assets, liabilities, and items of income, deduction and credits of became those of for income tax purposes. As is now a % owner in such,

LAW AND ANALYSIS

's and Consolidated Returns

We recommend that you use Forms 872-I for and consolidated return consents.

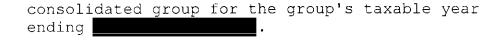
The consents should be prepared in the name of the parent corporation with reference to the affiliated companies. An extension filed in the parent's name only is not sufficient to bind the subsidiaries, regardless of the fact that they filed a consolidated return. $I.R.M. \ \S \ 25.6.22.6.2.1$

We recommend the following for the name of the taxpayer to be used on _____ and ___ and ___ consolidated return consents:

Because		name	e cha	inged	d du	iring	g the	middle	of	the	
tax year	, on t	the fir	rst <u>l</u>	ine	of	the	Form	872-I,	the	name	of
the taxp	ayer w	ould k	oe "					(EII	1:		
)	, as a	igent <u></u> 1	for					(EIN	1 :		
)	(form	nerly						and	b		
		consoli	date	ed gr	cour) * "					

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872-I followed by -

*	This	is	with_	respect	to	the	<u>consolidated</u>	federal
ir	ncome	tax	k of				(EIN:)
t)	forme	cly						



On the first line of the Form 872-I, the name of the taxpayer would be " (EIN:), as agent for consolidated group*"

Put an asterisk after the word "group" and then another asterisk at the bottom of the Form 872-I followed by -

* This is with respect to the consolidated federal income tax of the consolidated group for the group's taxable year ending the consolidated group for the group's taxable year ending the consolidated group for the group's taxable year ending the consolidated group for the group's taxable year ending the consolidated federal (EIN: The conso

Verify that "see EIN remained in after its S corporation election."

A single consolidated return consent for more than one year may be obtained <u>only</u> when the parent and subsidiary corporations are identical in the years covered. *I.R.M.* § 25.6.22.6.2.1 Because it is sometimes difficult to determine the subsidiary mix of a consolidated group from year to year and because of the difference in names to be used on the and consents, we recommend that <u>separate</u> consents be obtained for and and .

Treasury Regulation § 1.1502-77(a) provides in part that the common parent is the proper party to sign income tax consents for all members in the consolidated group.

The proper party to sign the stand consolidated group, is the proper party to sign the stand consolidated group statute extensions. We recommend that the signature block contain only the current name of the common parent, " without reference to the subsidiaries. The reference to "formerly " is not required for the signature block of the consent.

The regulations under I.R.C. \$ 6501(c)(4) do not specify who may actually sign consents executed under that section. Accordingly, the Service applies the rules applicable to the execution of the original returns to the execution of consents

to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer <u>duly authorized</u> to act.

The consolidated return consent(s) must be signed by a current duly authorized officer of.

's S Corporation Return

On ______, _____ filed Form 2553, "Election by a Small Business Corporation," through which ______ elected Subchapter S status for the _____ tax year. As an S Corporation, ______ is prohibited from filing a consolidated tax return with its subsidiaries. H.R. Rep. No. 586, 104th Cong., 2d Sess. 88 (1996).

made QSub elections for certain subsidiaries at the time of election to become an S corporation.

Under Internal Revenue Code § 1361(b)(3), a corporation that is a QSub is not treated as a separate corporation and all assets, liabilities, and items of income, deduction, and credit of a QSub are treated as assets, liabilities, and such items (as the case may be) of the S corporation. Section 1361(b)(3)(B) defines a QSub as any domestic corporation that is not an ineligible corporation 8 if (i) 100 percent of the stock of such corporation is held by the S corporation and (ii) the S corporation elects to treat such corporation as a QSub. Treasury Regulation § 1.1361-4 (a) states that the separate existence of a QSub is ignored for Federal tax purposes.

Because the separate existence of a QSub is ignored, QSubs are disregarded entities not treated as separate

⁸ An "ineligible corporation" means any corporation which is: (1) a financial institution which uses the reserve method of accounting for bad debts described in § 585; (2) an insurance company subject to tax under sub-Chapter L; (3) a corporation to which an election under § 936 applies; or (4) a DISC or former DISC. I.R.C. \$1361(b)(2).

corporations and their assets, liabilities, and items of income, deduction, and credits are treated as those of Therefore, a statute extension for covers both as an S corporation and its related QSubs.

We will need to discuss the statute extension requirements for any subsidiary for which did not make a OSub election.

There is no statute of limitations on an S corporation return for pass thru items to the shareholders, if the S corporation is non-TEFRA. The statute of limitations is determined at the shareholder level for each shareholder. Because S Corporations for taxable years beginning after are not covered by the TEFRA uniform audit procedures, is a non-TEFRA S corporation. Thus, the statute for each shareholder is extended by following the consent procedures for the individual or entity shareholder returns.

Where there is potential for tax on the S corporation itself, then the statute must be protected at the S corporation level. Tax due at the S corporation level can occur in the following situations:

- a. Tax imposed on S corporation built-in gains (I.R.C. § 1374);
- b. Tax imposed on S corporation passive investment income (I.R.C. § 1375); and
- c. If the corporation has filed as an S corporation, but it is later determined that it does not qualify as an S corporation, it will be converted to a C corporation. The statute of the converted C corporation begins with the filing of the S corporation return. If there is a potential that the S corporation will be converted to a C corporation, the statute must be protected.

We recommend that an "income" tax statute extension be obtained for " to protect the statute from expiring in regard to the above potential corporate level taxes.

Because , in , is considered to be a direct partner in , a TEFRA partnership, we recommend that you use Form 872-I for the corporate level consent.

The "consent must be signed by a current duly authorized officer of .

Employee Stock Ownership Plan ["ESOP"]

Since , all of common stock has been owned by its ESOP. An ESOP counts as one shareholder for purposes of determining the number of shareholders in an S corporation.

Items of income or loss do <u>not</u> flow through from S corporations to ESOP shareholders as unrelated business taxable income. ** I.R.C. \$ 512(e)(3). Therefore, because is sowned by its ESOP, ** S corporation flow thru income remains untaxed at both the corporate and shareholder level.

Although it appears that and its ESOP are exempt from flow thru income tax in , we recommend that you bring in a TE/GE revenue agent to assist in obtaining consents to extend the statute for any potential Chapter 43 excise tax that may be due from either , its subsidiaries or the ESOP.9 A TE/GE attorney from our office is also available to assist the TE/GE agent.

^{*}Generally, if a qualified retirement plan trust described in I.R.C. § 401(a) and exempt from taxation under I.R.C. § 501(a) holds stock in an S corporation, the interest is treated as an interest in an unrelated trade or business and the items of income, loss, deduction or credit of the S corporation that flow thru to the tax-exempt shareholder and any gain or loss on the disposition of the S corporation stock are taken into account in calculating the exempt organization's "unrelated business taxable income." I.R.C. §§ 512(e)(1)(A) and (B). Internal Revenue Code § 512(e)(3) provides a special exception and exempts ESOPs from treating the pass-thru income as unrelated trade or business income.

⁹Consideration should also be given to obtaining a consent to extend the statute for potential unrelated business tax due from the ESOP, should it ultimately be determined that the ESOP does not qualify for the § 512(e)(3) exclusion.

L.L.C. ["

- and

Small partnerships are not subject to the TEFRA unified proceedings unless they elect to be subject to them. For taxable years 1982 through 1996, I.R.C. § 6231(a)(1)(B)(i) defines a "small partnership" as a partnership in which:

- a. there are ten or fewer partners;
- b. each partner is a natural person (not a nonresident alien) or an estate; and
- c. each partner's share of each partnership item is the same as his or her share of every other partnership item.

For taxable years ending after <u>August 5, 1997</u>, I.R.C. \$ 6231(a)(1)(B) has been amended to provide that the same share requirement is no longer applicable and <u>C corporations are allowed as partners in addition to natural persons</u>.

The small partnership exception still does not apply to a partnership for a taxable year if any partner in the partnership during that taxable year is a pass-thru partner (i.e. a partnership). Treas. Reg. $$\le 301.6231(a)(1)-1(a)(2)$.

The determination of whether a partnership meets the requirements for the exception for small partnerships is to be made with respect to each partnership taxable year. Thus, a partnership that does not qualify as a small partnership in one taxable year may qualify as a small partnership in another taxable year if the requirements for the exception under section 6231(a)(1)(B) are met with respect to that other taxable year. Treas. Reg. §\$ 301.6231(a)(1)-1(a)(3).

Any partnership that meets the small partnership requirements is treated as a small partnership, unless it specifically elects to be treated under the TEFRA unified proceeding provisions. I.R.C. § 6231(a)(1)(B)(ii). The election is effective for the partnership taxable year to which the return relates and all subsequent partnership taxable years unless the election is revoked with the consent of the Commissioner. Id.

The election provided for in section 6231(a)(1)(B)(ii) is made by attaching a statement to the partnership return for the first taxable year for which the election is to be effective. Treas. Reg. § Sec. 301.6231(a)(1)-1(b)(2). The regulations also require that the statement be identified as an election under section 6231(a)(1)(B)(ii), be signed by each person who was a partner at any time during the taxable year to which the return relates, and be filed at the time (determined with regard to any extension of time for filing) and place prescribed for filing the partnership return. any partnership taxable year for which the due date of the return (determined without regard to extensions) is before January 2, 2002, the partnership may file the statement described in the preceding sentence on or before the date which is one year before the expiration of the period of limitations for assessment of tax under I.R.C. § 6229(a), including extensions by agreement provided for under I.R.C. § 6229(b).

Although not citeable authority, the Service's Partnership Audit Techniques Guide provides:

[c]hecking the 'yes' box on page 2 of Form 1065 which asks the question, 'Is this partnership subject to the consolidated audit procedures of section 6221 through 6234?,' does not constitute a proper election. Nor does the designation of a TMP, in and of itself, constitute a proper election.

Partnership Audit Techniques Guide, Ch.13, pg. 13-3.

The Audit Guide further provides that in instances where the partnership would not appear to qualify as a TEFRA entity, but designates a TMP on the tax return or responds positively to the consolidated audit procedures question, inquiry should be made as to whether there is an election in effect. *Id.* The examiner should secure the partnership's file copy of the election and determine if the election is valid under the Treasury Regulations. *Id.*

has only three partners which are each domestic C corporations. Since the return years at issue (and end after August 5, 1997, the corporate partners no longer prevent from meeting the small partnership exception.

Because meets the small partnership requirements, it must be treated as a small partnership, unless it can be shown that specifically elected to be treated under the TEFRA unified

proceeding provisions.

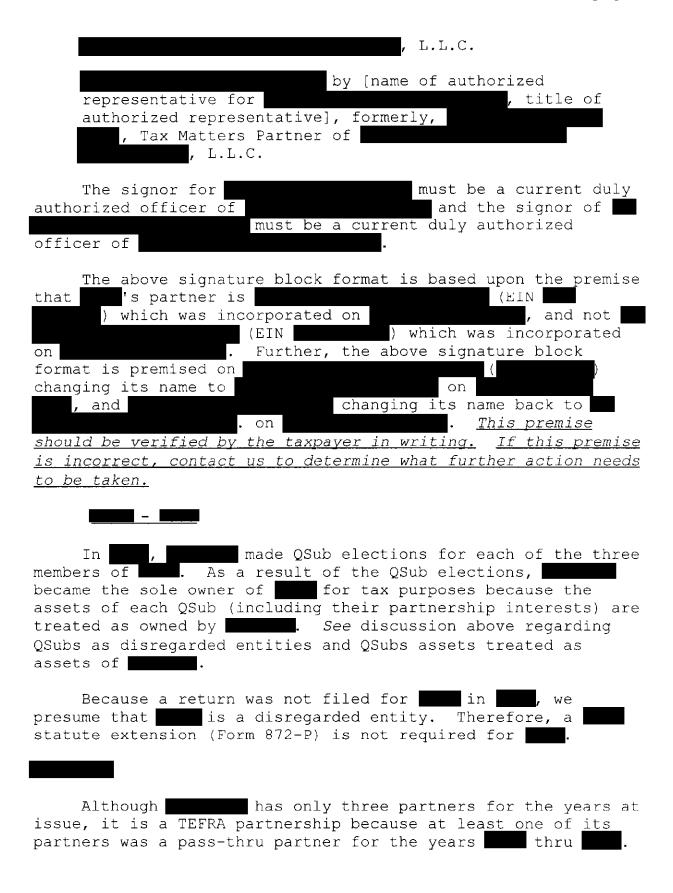
Because responded positively to the consolidated
audit procedures question on its return and designated a
TMP on its and returns, it should be verified in
writing that there was no intent that be treated as a
TEFRA partnership and that no election was filed electing TEFRA
treatment for . Written verification would need to be
signed by all three partners and by
(as common parent of the partners' consolidated group).
Although we believe that indicating an entity is subject to
TEFRA on a return and designating a TMP is not sufficient for a
small partnership to make an election to be subject to TEFRA,
we believe obtaining the subject verification is the prudent
course of action.

If _____ indicates that it intended for TEFRA to apply, that written verification would not qualify as an election under Treas. Reg. section 301.6231(a)(1)-1(b)(2), unless there is one year remaining on the TEFRA period of limitations or unless ____ had previously submitted a written statement on a timely basis.

Pending written verification, you should obtain a Form 872-P for and that is signed by both and the TMP. The signature block should appear as follows (providing for two signatures):

	by [name of	authorized	representative
for	, title	of authorize	ed
representative], as	agent of		
formerly	,	Tax Matters	Partner of

¹⁰The reason that we recommend that the parent sign all consents on behalf of its consolidated group subsidiaries is because Treas. Reg. § 1.1502–77 provides that the common parent shall be the "sole agent for each subsidiary in the group, duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year." Thus, under the regulations, the parent of a consolidated filing group acts on behalf of the group with respect to all tax matters. In this regard, it is the parent who must extend the period of limitations on behalf of the consolidated group with respect to the consolidated return. Such consent "shall be considered as having also been given or executed by each such subsidiary." Id.



(formerly

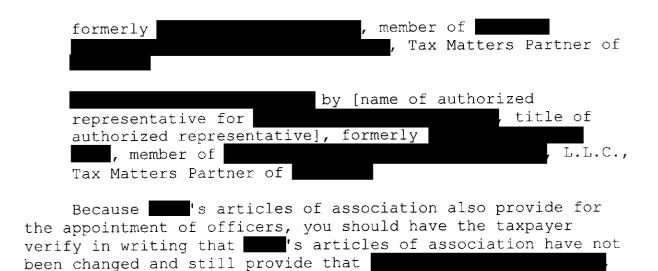
⁸Again, because

- and Where the TMP of the source partnership (\blacksquare) is also a partnership/LLC (), the question arises, who can act for the second tier partnership in its capacity as the TMP of the source partnership. Pending written verification as to whether is a TEFRA partnership, you will need to obtain two sets of Forms 872-P for _____ One set to be signed treating ____ as not being a TEFRA partnership and the other set to be signed treating as a TEFRA partnership. If TMP of , is not considered to be a TEFRA partnership is not a TEFRA partnership, then a determination is required as to who may bind as TMP of was incorporated in under the laws of the as a limited liability company. Paragraph of 's original articles of association provides that the members of shall have full, complete, and exclusive authority to manage and control substitute business affairs and to buy, sell and borrow on behalf of and to perform all other acts or activities customary or incidental thereto. Paragraph of the articles of association further provides that no member may delegate any powers and duties to other persons. Based upon 's articles of association, , as a member of ____, can bind ____ as TMP of We recommend that 's and Form 870-P be signed by duly authorized officers of and as follows: by [name of authorized representative for _____, title of authorized representative], as agent of _____

) was a member of the consolidated group for and respectively,

, as the common parent, should also sign the consent.

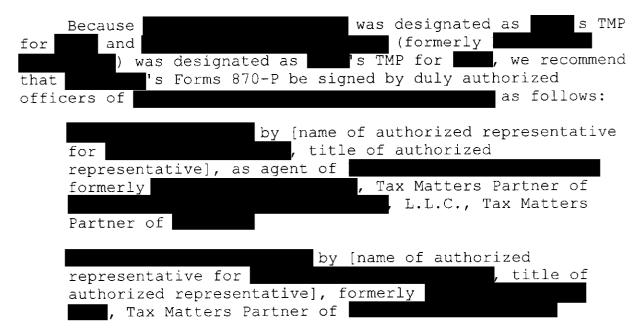
to be taken.



as a member of ____, is authorized to bind ____. If this is not the case, contact us to determine what further action needs

If _____, TMP of _____, is considered to be a TEFRA partnership

When the second tier partnership designates its own TMP, we will accept that as an authorization to have that partner also act on behalf of the second tier as the TMP for the source partnership. If a statute extension is executed by a partner of the second tier partnership, the document must <u>expressly</u> provide that the partner is signing in a representative capacity.



, L.L.C., Tax Matters Partner of
The signor for must be a current duly authorized officer of must be a current duly and the signor of must be a current duly authorized officer of must be a current duly authorized.
Because is considered to hold a direct partnership based upon the QSub election for and was designated as the TMP on should sign should sign should sign some statements. Form 872-P as follows:
by [name of authorized representative for, title of authorized representative], Tax Matters Partner of
The signor for must be a current duly authorized officer of

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

ROGER L. KAVE Attorney (LMSB)